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Nos. 357 and 358

In the Supreme Court of the United States

OCTOBER TERM, 1954

CIRACO MANEJA, et al., PETITIONER

v.

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v.

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SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN RESPONSE TO BRIEF FILED BY THE AMERICAN FARM BUREAU FEDERATION

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I.

The American Farm Bureau Federation's brief as *amicus curiae* emphasizes even more than the Waialua brief the contention that the Labor Department's interpretation of the agricultural ex-

emption, prior to this suit, required exemption of the employees involved here, and were generally relied upon by farmers during all the years since the passage of the Fair Labor Standards Act. Because of this emphasis, a more extensive explanation of the history of the administrative interpretation seems now to be necessary.

1. Relying solely on Interpretative Bulletin No. 14 (1939), the Farm Bureau's brief neglects to mention the important modification of this bulletin with respect to manufacturing and transportation operations carried on as separate and distinct functions by growers of agricultural crops. In particular, modifications were made specifically in the interpretations regarding manufacturing and transportation operations carried on by sugar cane growers, and these modified interpretations have been long-standing and well known to the industry. They were also specifically brought to the attention of the legislative committee considering the comprehensive amendments to the Fair Labor Standards Act in 1949, and were left unchanged by those Amendments although many other changes were made in various administrative interpretations of the Act at that time.

a. On September 15, 1941, the Department of Labor issued a press release (published in the 1942 Wage Hour Manual, page 408), stating that the particular provision relating to sugar manufacturing in Interpretative Bulletin No. 14, on which Waialua places reliance and which is referred to by the American Farm Bureau Federation, should

no longer be relied upon. Referring to the decision of the Court of Appeals for the First Circuit in *Bowie* v. *Gonzalez*, 117 F. 2d 11, the press release stated that it would seem from the Court's decision that "the exemption for agricultural employees provided by the Wage and Hour Law does *not* apply to sugar mill employees *even if the only cane ground in such a mill is cane grown by the sugar mill owner on his own field*," and that "the Wage and Hour Division went too far in expressing the view in Interpretative Bulletin No. 14, relating to exemptions granted to agriculture and the processing of agricultural commodities, that if a sugar mill operator grinds only the cane which he grows himself the exemption for agricultural employees may possibly apply under some circumstances to his mill employees" (emphasis added).

This release was issued over 13 years ago, and some 6 years before the institution of the instant cases. It was given wide circulation and attention was repeatedly called to it in subsequent opinions and interpretations. A copy of the full press release (R-1568) is attached as an Appendix, *infra*.

b. Since the date of the 1941 press release, the Department of Labor has repeatedly, whenever the occasion presented itself, reiterated the position that under the First Circuit decisions the Section 13(a)(6) exemption is not applicable to mill or transportation employees simply by reason of the fact that they are under common ownership with a farm and are used solely to service and process the crops produced on that farm. This position was

explicitly called to the attention of the sugar industry in 1944 during a proceeding incident to the approval of a wage order for the Sugar and Related Products Industry, in response to a proposal by the representative of the *Hawaiian Sugar Planters Association*, of which the Waialua Company is a member. The representative of the Hawaiian Sugar Planters Association proposed that the definition of the industry to which the wage order would be applicable should be modified to exclude "transportation and delivery [to the processor which] is performed by the farmer-producer and his own employees" (Transcript, Industry Committee No. 50 for Sugar and Related Products Industry, p. 10, 69). In rejecting this proposal, the Administrator made this statement regarding the application of the agriculture exemption:

> Whether or not a particular employee engaged in loading or transporting sugar cane from a farm to a mill is to be regarded as "employed in agriculture," as agriculture is defined in Section 3(f) of the Act, and hence exempt from the minimum wage provisions of the Act under Section 13(a)(6), is a question of fact to be determined upon the basis of all the evidence and the applicable rules of law. See Interpretative Bulletin No. 14, paragraphs 1-13. See also the decision of the Circuit Court of Appeals for the First Circuit in the case of *Calaf (Callazo)* v. *Gonzalez*, 127 F. 2d 934, where it was decided that the Section 13 (a)(6) exemption was inapplicable to em-

> ployees engaged in transporting sugar cane from their employer's farm to their employer's sugar mill, even though the cane was grown by the employer of the employees in question. [*Findings and Opinion of the Administrator*, May 20, 1943, p. 5.]

c. In answer to all inquiries made by interested parties and by the regional representatives of the Department of Labor, subsequent to the decisions of the First Circuit, the Department repeatedly and consistently stated that its interpretations would be guided by the First Circuit's decisions in *Bowie* v. *Gonzalez* and *Calaf* v. *Gonzalez*.

Typical of the advice given regional representatives of the Department, which served to guide them in advising interested employers and employees, is this statement contained in a memorandum to the Department's regional attorney whose region included Louisiana, dated November 25, 1941:

> The *Bowie* decision dealt with large scale sugar mill operations which are typical factory operations, and the court held that such mill activities are not incidental to the farming operations conducted by the mill operator. In issuing release R-1568 [quoted *supra* and in Appendix, *infra*], the Administrator wished to make it clear that even though a mill operator grows all the cane ground at his mill, sugar *mill operations* of the type described in the *Bowie* case *are clearly not an "incident to*

> *or in conjunction with" the farming operations of the mill operator* within the meaning of section 3(f), and that the section 13(a)(6) exemption is inapplicable under such circumstances to the mill employees. [Emphasis added].

A copy of this memorandum was sent on December 4, 1941 to the Department's regional attorney in San Francisco, (under whose jurisdiction Hawaii was included) in response to a specific request as to the import of Press Release-1568.[1]

Similarly, typical of the advice given interested parties is this statement from a letter dated October 9, 1946, to Mr. James Marshall, Director, Sugar Branch, Production and Marketing Administration, United States Department of Agriculture,[2] from the Deputy Administrator of the Wage and Hour Division:

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[1] This memorandum was signed by Mr. Rufus G. Poole, now counsel for Waialua in the instant case, then Assistant Solicitor of the Department of Labor in charge of opinions and review. Cf. the statement in Waialua's reply brief, pp. 27, 28, that the interpretations to which the Department now refers are "some newly devised interpretations contrived to defeat Waialula's position under the circumstances herein."

[2] The interest of the Department of Agriculture derived from its functions under the Sugar Act. Mr. Justice Frankfurter, at the oral argument, raised a question as to the application of the Sugar Act to Hawaii. That Act does apply to Hawaii as well as Puerto Rico. See Waialua Company's reply brief, p. 20, citing references to a number of wage determinations for Hawaii by the Secretary of Agriculture. It may be noted that Waialua purports to find some support in the fact that the Secretary of Agriculture in certain years in the past had

The mere fact that the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the farm to the mill is "incident to farming" and therefore exempt under section 13(a)(6). In such a situation, it becomes a question of fact whether the truckers are employed by the plantation in work incidental to farming operations, so that they would be exempt under section 13(a)(6), or whether they are employed by the centrale in work incidental to milling operations which would not be exempt. *In deciding this question the Divisions have adopted the tests used* by the court in *Calaf Callazo* v. *Gonzalez*, 127 F. 2d 934. Thus, where the employees are on the farm pay roll, report to the farm for instructions daily and at the end of the day, are generally supervised from the farm, perform agricultural work on the farm and where the trucks are stored and maintained on the farm—these are factors indicating that the employees are performing work which is an incident to the farming operations. *On the other hand, where the employees are on the*

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fixed wages for some mainline railroad employees. Admittedly, wages have not been fixed by the Secretary of Agriculture for such railroad employees since 1945, and we are advised that the apparent reason why the Secretary ceased to fix such wages was because he concluded he had no such authority under the Sugar Act, which applies to "persons employed on the farm in the production, cultivation, or harvesting." Sugar Act of 1937, 50 Stat. 909, 7 U.S.C. sec. 1131; Sugar Act of 1948, 61 Stat. 929, 7 U.S.C. sec. 1131 (continuing the same provision).

> *mill pay roll, are supervised from and report to the mill, and perform other work at the mill, these factors would indicate that the work of the employees is incidental to the milling operations.* [Emphasis added.]

See also letter to Paul Guillot dated November 26, 1942, quoted in the main brief for the Secretary of Labor, p. 43-44, n. 6.

d. In addition, the views of the Department of Labor were included in published opinions of the National Labor Relations Board in the course of hearings involving the Grower-Shipper Vegetable Association, 35 Wage Hour Manual 369-376. The position of the Department of Labor was summarized in the following excerpts from a letter addressed by the Solicitor of Labor to Senator Hayden dated October 3, 1949 (which was incorporated in the published opinion of the Labor Relations Board):

> Since the decision of the First Circuit in *Bowie* v. *Gonzalez*, 117 F. 2d 11 [1 WH Cases 99] (C.A. 1), and Wage-Hour Division release R-1568, the operation, by the owner of a farm or farms, of a large packing or processing plant of a type operated by non-farmers and having predominately industrial characteristics has not, as a rule, been considered a practice "incident to or in conjunction with" the owner's farming operations. Even though the commodities worked on at such a plant are raised exclusively by the owner, it cannot

> fairly be said in the ordinary case that such plant operations which are characteristic of a nonfarming enterprise are performed as an incident to farming. Equal justification would exist for saying that the farming operations are incident to the plant operations. Neither can be fairly viewed as subordinate to the other and each, in such circumstances, has been considered a distinct and different enterprise of the common owner. [35 Wage Hour Manual at 375.]

2. That the Waialua Company was under no misapprehension regarding the position of the Department of Labor is evident from the testimony in the record in this case of the Company's own witness Mr. Raymond John O'Donnell, who testified that the company recognized that the Fair Labor Standards Act was applicable to employees in the factory and allied shops during the off season, to some of the employees in the railroad department and to its office staff, and that it paid them for overtime pursuant to the requirements of the Act during the off season when no processing was going on (R. 336-367, 391-392).[3] The plain import of this evidence is that the Company regarded these employees as outside the scope of the agriculture exemption of 13(a)(6), and within the scope only of Section 7(c) (the overtime exemption for processing). In addition, prior to the institution of this litigation, the Company admittedly

[3] See also findings of District Court, R. 793, 797, 802.

paid social security taxes on the mill, repair shop and railroad employees on the assumption that they were "industrial", not "agricultural", workers under the Social Security Act (R. 623, 628).

3. And there can be no question, of course, that since the date the Department of Labor filed its brief *amicus curiae* in the first appeal of the instant cases, i.e. November 1948, there has been no doubt of the Department's interpretation of the agriculture exemption. And it is noteworthy that the views stated by the Department of Labor in this brief were specifically called to the attention of the legislative committee which held hearings on the 1949 amendments to the Act. (See Hearings before Committee on Education and Labor, House of Representatives, on H.R. 2033, 81st Cong., 1st Sess., Volume 2, pp. 1165-1166, 1168). Ernest Green, Vice President of the Hawaiian Sugar Planters Association testified about the pendency of this litigation in the Ninth Circuit, and stated:

> The Administrator of the Wage and Hour Division has filed an amicus brief with the Court opposing the application of the agricultural exemption to [the processing of sugar cane, even when done by the growers upon only the cane which he grows himself [p. 1166] * * *. He has taken the position, sir, that it [processing of sugar cane] is not exempt by the terms of the agricultural exemption. He does not contend that it is not exempt by 7(c). Section 7(c) is the section as you know, sir,

> which exempts certain agricultural processing operations, among them the processing of sugar cane * * * [p. 1168].[4]

Since the agricultural exemption in Section 13 (a)(6) was not amended except in one limited respect not here pertinent, it would appear that Section 16(c) of the 1949 amendments, which explicitly kept "in effect" "an order, regulation, or *interpretation* of the *Administrator* of the Wage and Hour Division or of the Secretary of Labor" not inconsistent with those amendments, would apply to the interpretation as stated in the brief to which the committee's attention was directed. The fact that this interpretation was specifically called to the attention of the legislative committee, and that the statutory language thus interpreted was not amended would seem persuasive evidence of con-

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[4] It may be noted that Mr. Green's testimony also shows that there are a number of sugar cane producers in Hawaii who do not perform their own processing. While, according to his testimony, most of the large scale growers in Hawaii do process their own sugar cane, he testified that three large scale growers do not process their own cane but have it milled by an adjacent place, and that some 1,500 or 1,800 small "adherent planters" also do not process their own cane. Hearings, *supra*, p. 1173. From information furnished by the Sugar Division of the United States Department of Agriculture, we are advised that there are about 26 sugar processing plants in Hawaii, only 7 of which process solely cane grown by themselves, and 19 of which process cane grown by others as well, 9 of them processing substantial amounts for other growers. It is thus apparent that it is by no means a universal practice among sugar cane growers in Hawaii to process their own cane.

gressional purpose to leave that interpretation unchanged.

Thus, this seems clearly an appropriate case for the application of the principle repeatedly applied by this Court that " * * * the substantial reenactment in later acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation" (*Brewster* v. *Gage*, 280 U.S. 327, 337). This Court's restatement of the principle in *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366, is equally pertinent here:

> * * * In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board. Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provisions with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts.

The application of this principle would seem particularly appropriate here in view of the specific provision of Section 16(c) of the 1949 amendments. See *Alstate Construction Co.*, v. *Durkin*, 345 U.S. 13, 17, where this Court upheld a changed interpretation of the Department of Labor under this very Act, noting that "The new interpretation was reported to Congressional committees on a number of occasions" and "Interested employers severely criticized the Administrator's changes", but "In-

stead of adopting any of the suggestions to undermine the Administrator's interpretation, Congress in a 1949 amendment to the Fair Labor Standards Act provided that all past orders, regulations and interpretations of the Administrator should remain in effect", except to the extent that they might be inconsistent with the Amendments (referring specifically to Section 16(c)). (335 U.S. at 16-17).[5]

II.

The American Farm Bureau Federation, like the Waialua Company, also relies heavily on excerpts from the legislative history. The legislative debates on the agricultural exemption are extremely voluminous and no sound conclusions can be reached from consideration of isolated colloquies. The entire debates on this exemption unquestionably show an intent to exempt work which is truly

[5] The Farm Bureau Federation's brief (pp. 15-18), like that of *Waialua*, places considerable emphasis on various administrative interpretations that truck drivers working for a farmer and hauling his crops and equipment are exempt. But Waialua's extensive transportation and repair operations are hardly comparable to the incidental truck drivers in the examples given in these administrative interpretations. For the same reason, the relevance of counsel's statement, in oral argument, that the company has abandoned its railroad transportation system and is now using trucks is not apparent. Since the facts of the change-over to trucks are not in the record, we cannot, of course, know the precise nature of the present system. But in all likelihood the trucking system is of the same size and proportions as the railroad transportation system, so that the examples in the administrative interpretations would be no more applicable to the trucking system than to the railroad.

of an agricultural nature. But the legislative history also shows the Congressional concern that the exemption should not make sweeping inroads into the coverage of employees engaged in industry, including manufacturing and processing. This is evident from the care with which the exemptions for processing and manufacturing were phrased. For example, see the colloquy between Senators Barkley and Schwellenbach quoted in the First Circuit's *Bowie* opinion.

As the First Circuit pointed out in the *Bowie* case, Sections 13(a)(10) and 7(c) which relate specifically to particular kinds of "processing" of agricultural commodities, were very carefully limited. Section 13(a)(10), for example, is not only limited to certain specifically enumerated processes, (among which processing of sugar cane is *not* found), but is further limited to preparation of the commodities in their "raw or natural state" and only to processing "within the area of production". Similarly, the overtime exemption in sec. 7(c) is specifically limited to enumerated processes and further limited to the "place of employment". The fact that this exemption, which is from the overtime provisions of the Act only, specifically exempts "the processing of * * * sugar cane" into raw sugar, as the First Circuit points out, is most convincing evidence that Congress intended to deal with that processing specifically and separately and not in any general exemption. It is noteworthy that, with all the terminology included in the agriculture exemption, the word "processing" is no-

where used, and indeed appears to have been scrupulously avoided. There is plainly no rational basis why Congress should have provided a full exemption (from minimum wage, child labor, as well as overtime requirements) for processing sugar cane by large producers while providing only a partial and much more limited exemption for the processing of cane grown by small producers. Yet this is the effect of Waialua's and the American Farm Bureau Federation's contention.

Respectfully submitted,

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APRIL 1, 1955.

APPENDIX

For Release Monday,
September 15, 1941

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington

APPELLATE COURT OPINION RULES IN EXEMPTION OF SUGAR MILL EMPLOYEES

Exemption of workers in sugar mills as agricultural employees from the wage and hour provisions of the Fair Labor Standards Act seems to be contrary to a prevailing appellate court decision, General Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, warned today.

He referred to the decision of United States Circuit Court of Appeals for the First Circuit in the case of Bowie v. Gonzalez 117 Fed. (2d) 11. General Fleming pointed out that in its decision the court referred to employees working in sugar mills as typical factory workers who are not exempt from the wage and hour law as agricultural employees.

"It would seem from the court's decision," General Fleming said, "that the exemption for agricultural employees provided by the wage and hour law does not apply to sugar mill employees, even if only the cane ground in such a mill is cane grown by the sugar mill operator on his own fields.

"Therefore it appears that the Wage and Hour Division went too far in expressing the view in Interpretative Bulletin No. 14, relating to exemptions granted to agriculture and the processing of agricultural commodities, that if a sugar mill operator grinds only the cane which he grows himself the exemption for agricultural employees may possibly apply under some circumstances to his mill employees. As stated in all the Division's interpretative bulletins, the opinions expressed 'indicate merely the construction of the law which will guide the Administrator in the performance of his administrative duties, unless and until he is directed otherwise by authoritative ruling of the courts.' "

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 [illegible] 1781